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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION, *Petitioner*,

v.

SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

CITY OF COLTON, CALIFORNIA, *Petitioner*,

v.

SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF AMERICAN PUBLIC POWER ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

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No. 71

FEDERAL POWER COMMISSION, *Petitioner*,

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SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

No. 73

CITY OF COLTON, CALIFORNIA, *Petitioner*,

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MOTION OF AMERICAN PUBLIC POWER ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Public Power Association respectfully moves this Court for leave to file the accompanying brief in these cases as *amicus curiae*. The consent

of the attorneys for the petitioners herein has been obtained, but the attorney for the respondent Southern California Edison Company has refused to consent to the filing of a brief by the American Public Power Association as *amicus curiae*.

The applicant American Public Power Association, a national trade association, has an interest in these cases in that it represents through its direct members and affiliated organizations more than 1,200 local publicly-owned electric utilities in forty-five states, including the petitioner in No. 73, the City of Colton, California. Many of these publicly-owned electric utilities purchase electric energy for resale from investor-owned electric utilities and will be directly affected by this Court's determination of the conditions under which the Federal Power Commission may regulate the rates of interstate sales of electric energy at wholesale.

The Association asks leave to file the accompanying brief to urge reversal of the judgment under review. The Association's brief does not attempt to restate the contentions made by the Federal Power Commission or the City of Colton in the court below or in their petitions for certiorari here. Rather, the brief raises only the issue that the Court of Appeals decision is inconsistent with the intent of Congress in enacting Section 201(b) of the Federal Power Act in that it leaves perilous confusion and gaps in the regulation of the rates of wholesale sales to literally hundreds of publicly-owned electric utilities throughout the country. The briefs of petitioners have not been filed in this Court; but the applicant Association has no

reason to believe that the argument on this issue will be made complete in this Court.

Respectfully submitted,

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August 30, 1963

IN THE

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OCTOBER TERM, 1963

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BRIEF OF AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

By leave of this Court, the American Public Power Association files this brief as *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The *amicus curiae*, American Public Power Association, a national trade association, has an interest in these cases in that it represents through its direct members and affiliated organizations more than 1,200 local publicly-owned electric utilities in forty-five states, including the petitioner in No. 73, the City of Colton, California.

A great many of the local publicly-owned electric utilities represented by the Association purchase electric energy for resale from investor-owned utilities, which have been classified by the Federal Power Commission as "public utilities" under the Federal Power Act.[1] These publicly-owned electric utilities will be directly affected by this Court's determination of the conditions under which the Federal Power Commission may regulate the rates of interstate sales of electric energy at wholesale.

ARGUMENT

The decision of the court below[2] would require that the regulatory jurisdiction of the Federal Power Commission over interstate sales at wholesale be based upon a finding as to each wholesale transaction of a "national interest" in the sale arising from a conflict of state interests. We submit that such a test would be totally unworkable, for it would create confusion

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[1] See publication of the FPC, "List of Electric Power Suppliers With Annual Operating Revenues of $2,500,000 Or More Classified as Public Utilities Under the Federal Power Act," January, 1963.

[2] Southern California Edison Co. v. Federal Power Commission, 310 F. 2d 784 (9th Cir. 1962).

and doubt in the regulation of many hundreds of wholesale sales to publicly-owned electric utilities, in many instances would result in wholesale sales without regulation by either a federal or state commission, and would ignore the factors in the development of the electric power industry which increasingly demand uniform federal regulation.

I

A case by case determination of "national interest" in sales at wholesale would be all but an impossibility. For the year ended December 31, 1962, at least 130 investor-owned utilities reported to the F. P. C. that they made sales for resale to municipalities such as the City of Colton, California. These sales at wholesale were made to at least 967 municipalities in forty-three states.[3] Discounting the instances where it could be shown that the electric energy involved was not transported in interstate commerce, it is inconceivable that Congress intended that each of the remaining wholesale transactions be examined for elements of "national interest" before jurisdiction over rates in either a state or federal commission could be determined. If the test of the court below were to stand, it would be years before these hundreds of municipalities would know the appropriate forum to contest the reasonableness of wholesale rates and service. During all this time the burden of maintenance of appropriate reserves and the expenses of lengthy commission proceedings would impose a special burden upon these municipalities, particularly smaller ones. These costs alone might well have the anomalous result of discouraging small municipalities from seeking commis-

[3] 1962 Annual Reports of Electric Utilities and Licensees, Classes A and B, F.P.C. Form No. 1, Account 447, "Sales For Resale."

sion determination of the reasonableness of the rates of their wholesale purchases.

Even assuming that under the transaction-by-transaction approach taken by the court below the regulatory jurisdiction over the wholesale sales to these more than 900 municipalities could be determined at some point of time, ever changing circumstances would preclude any degree of certainty or finality. As Judge Browning pointed out in his dissenting opinion in the Court of Appeals,[4] new sales by Southern California Edison in another state such as Nevada would reopen the question of the presence of a "national interest" in the sales to the City of Colton; and subsequent discontinuance of such Nevada sales would reopen the question still another time. The continuous confusion and harassment imposed upon the many power companies and municipalities alike would be unfortunate indeed.

This jurisdictional problem, therefore, is by no means confined to the City of Colton or to a few like municipalities; the problem, rather, is visited upon the many hundreds of municipally-owned electric systems which purchase power for resale.

II

If a particular wholesale transaction were found to be lacking the "national interest" required for FPC jurisdiction by the court below, it could not necessarily be assumed in all states that there would be regulation of such a transaction by a state commission. Sales by electric utilities for resale are not regulated at all by state commissions in the states of Alaska, Min-

[4] 310 F. 2d at 796.

nesota, Mississippi, Nebraska, South Dakota, and Texas.[5] In the states of Florida[6] and Michigan[7] sales at wholesale to municipalities are not regulated. In Iowa the state commission, until this year, had not regulated electric utilities[8], and the question of regulation of wholesale sales to publicly-owned utilities has apparently not been resolved. The jurisdiction of the state commission in Ohio to regulate such sales is doubtful, because the State Attorney General has ruled that the commission lacks authority to make orders affecting municipally-owned electric systems.[9] It cannot be assumed that Congress intended a regulatory gap such as is threatened in these ten states.

III

The need for federal uniformity of regulation of interstate wholesale rates becomes more apparent each day as the almost incredible technological advances in the electric power industry are put into actual operation. We are truly into the era of a nation-wide interconnected power grid system, and the older concepts of state-wide or even regional power generation and transmission are fast becoming outmoded. As FPC Chairman Joseph C. Swidler has stated:

> "In the past most electricity in this country moved in point-to-point transactions, in which power was

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[5] Publication of the Federal Power Commission, "State Commission Jurisdiction and Regulation of Electric and Gas Utilities", pp. 18-21 (1960).

[6] Fla. Stat. Ann. § 366.11 (1958).

[7] Mich. Stats. Ann. § 22-4 (1937).

[8] Iowa Code Ann. West Pub. Co. Legis. Serv. Vol. 3, pp. 150-56 (1963).

[9] 1933 Ops. Atty. Gen. No. 1480.

transmitted from an isolated generating station to a load center in the same state. These sales were of course intrastate and not subject to federal jurisdiction. However, we are now increasingly concerned with interstate networks consisting of a great number of power plants tied together by high voltage transmission lines covering many states. Indeed, practically all of the power companies in the eastern half of the United States are already tied together and operate in electrical synchronism so that each part of all of the interconnected systems has an impact upon every other part. Power flows are not constant in a single direction but change from moment to moment with variations in use and supply at the myriad points on the interconnected grid system. The fugitive nature of the power flows and the complexity of the physical arrangements is paralleled by the complexity of the contractual agreements under which these interconnected systems are established and operated."[10]

Since November of 1962 we have seen in operation a giant power pool interconnecting nearly seventy per cent of the nation's power supply. The resulting 146-million-kilowatt grid is composed of the electrical facilities of 41 states and two Canadian provinces.[11] The next decade promises continued growth of tremendous proportions. The Edison Electric Institute estimates that:

"... the 1970 transmission map is expected to show about 100,000 more miles of transmission lines

[10] Address by Joseph C. Swidler, Chairman Federal Power Commission, "Electric Power Interconnections and Grid Systems," before the National Association of Railroad and Utilities Commissioners, November 14, 1962.

[11] "Synchronizing the World's Largest Power Pool," Electrical World, Vol. 160, No. 4, pp. 18-20, 22 (July 22, 1963).

than were on the 1960 map. And with the addition of these new transmission lines, America's interconnected grid systems of electric power will be capable of even more complete coverage of the length and breadth of the land.

"To build these new transmission lines, which will form a nationwide grid system operating from coast to coast, the investor-owned companies will be spending billions of dollars—$8 billion on transmission facilities alone between 1960-1970."[12]

The President of the Edison Electric Institute has recently written that:

"Some of the facilities now being planned and built by electric utilities will make it possible for all major systems in the country to operate in parallel by 1966."[13]

We submit that this technological development without regard for geographic boundaries must necessarily result in a growing inability of state commissions to regulate wholesale transactions of utilities that are interconnected interstate. Determination of reasonable wholesale rates of a particular utility will require intimate knowledge of the workings, contractual arrangements, and financial operations of the whole power pool of which the utility is a part. This in turn will require scrutiny of the books and records of activity of many power companies existing and operating in several states. No one state commission can have the control over out-of-state utilities to acquire this detailed information; and few will have

[12] Edison Electric Institute, "Networks of Electric Power" (May, 1963).

[13] Lynch, "Power and Progress," Edison Electric Institute Bulletin Vol. 31, No. 6, p. 181 (June-July 1963).

staffs of sufficient size and training to cope with the overall complexities of giant power pools. As the nation's private power facilities are interconnected to an increasing extent, clearly the regulation of the rates for wholesale sales of electric energy is the province of the F.P.C.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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